

Michael D. Kinkley
Scott M. Kinkley
Michael D. Kinkley, P.S.
4407 N. Division, Suite 914
Spokane, WA 99207
(509) 484-5611
mkinkely@qwestoffice.net
skinkley@qwestoffice.net

Kirk D. Miller
Kirk Miller, P.S.
209 E. Sprague Ave.
Spokane, WA 99202
(509) 413-1494
kmiller@millerlawspokane.com

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

KELLI GRAY, and all others similarly)
situated,)
Plaintiff,) Case No.: CV-09-251-EFS
v.)
SUTTELL & ASSOCIATES;) MEMORANDUM IN SUPPORT OF
MIDLAND FUNDING, LLC; MARK) PLAINTIFF'S MOTION TO STRIKE
T. CASE, and JANE DOE CASE,) "EXHIBIT 'A'" ATTACHED TO THE
husband and wife, KAREN HAMMER) SUTTELL DEFENDANTS
and JOHN DOE HAMMER, wife and) MEMORANDUM REGARDING
husband.) APPLICABLE STATUTE OF
Defendants.) LIMITATIONS (Ct. R 34-1, pp. 16-22)

The Suttell Defendants have produced no admissible evidence in support of their Motion for Summary Judgment Re: Statute of Limitations. (Ct. Rec. 32). The

1 Suttell Defendants argument is supported only by Exhibit "A" attached to their
 2 Memorandum. Exhibit "A" consists of:

- 3 a. Declaration of Elizabeth Neu, "Form 400", (Ct. Rec. 34-1, p. 16);
- 4 b. Signature page for Declaration of Elizabeth Neu, form "WA1" (Ct. Rec. 34-
 5 1, p. 17,);
- 6 c. "Bill of Sale and Assignment" (Ct. Rec. 34-1, p.18-19,);
- 7 d. "Spiegel" Statement (Ct. Rec. 34-1, p. 20);
- 8 e. FCNB Agreement (Ct. Rec. 34-1, p.21).

9
 10 The Plaintiff objects to the admission of these documents.

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 12 I. The Records are Hearsay

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 14 "Hearsay" is a statement, other than one made by the Declarant while
 15 testifying at the trial or hearing, offered in evidence to prove the truth of the matter
 16 asserted." Fed. R. Evid. 801(c). Hearsay is not admissible unless an exception
 17 applies. Fed. R. Evid. 802. The Defendants may claim that the "regularly kept
 18 records" (often called "business records" exception) applies. ER 803(6). But these
 19 records do not and can not meet that exception for a number of reasons.¹

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 21 The Plaintiff does not dispute that "Exhibit 'A'" was filed in the State Court
 22 Collection Lawsuit. The Defendants offer the "Exhibit 'A'" for the alleged truth of
 23 the matter therein hoping it would demonstrate that FCNB owned the Gray account

24
 25 ¹ The deposition of the Affiant Elizabeth A. Neu has been noted for August 16, 2010 in Minneapolis Minnesota.

1 (Defendants Memorandum, Ct. Rec. 34, p.2, ln. 13-14, 21-23; p.8, ln. 4-5, 15-16).

2 In addition, “Exhibit ‘A’” is not only not admissible but also unreliable since
 3 “Exhibit ‘A’” attached to the Suttell Memorandum is not an original. “Exhibit ‘A’”
 4 contains internal inconsistencies which would also justify removal from the record.

5

6 II. Declaration of Elizabeth Neu, “Form 400” (Ct. Rec. 34-1, p. 16), and form
 7 “WA1” signature page for “Form 400” (Ct. Rec. 34-1, p. 17)

8 The Affidavit of Elizabeth A. Neu makes conclusory unsupported opinion,
 9 hearsay statements in anticipation of litigation. The statements are also inconsistent
 10 with documents attached to the Affidavit. (Ct. Rec. 34-1, p. 16-17).

11

12 There is no statement in the Neu Affidavit that Ms. Neu has ever seen the
 13 attached records before. Ms. Neu’s Affidavit makes conclusions that she claims
 14 she is able to make from her review of Defendant Midland Funding, LLC’s
 15 records.

16

17 Defendants claim the account was owned by FCNB but the only assignment
 18 is from “Spiegel Acceptance Corporation.” (Ct. Rec. 34-1, p. 18-19). Defendant
 19 claims FCNB is the original creditor. How did the Spiegel account get from FCNB
 20 to Spiegel Acceptance? Ms. Neu states that “Midland Funding (sic) LLC is the
 21 current owner of, and/or successor to, the obligation sued upon.” This claim is
 22 unsupported. Ms. Neu does not reference the Bill of Sale or authenticate it as a
 23 business records but rather, offers her opinion that the “final statement of account”
 24 shows a balance of “\$2,065.22” with an interest rate of “0.00%” on December 31,

1 2004. (Ct. Rec. 34-1, p. 16). Attached to her declaration is a May 3, 2003,
 2 “Spiegel” statement showing a balance of “\$1,394.76.” (Ct. Rec. 34-1, p. 20). The
 3 discrepancy is not explained. It is further unexplained how there could be a “final
 4 account balance” on December 31, 2004, when the OCC required FCNB to cease
 5 and desist servicing all accounts, “no later than June 30, 2003.” (Ct. Rec. 62-1, p.5)
 6

7 Ms. Neu makes other conclusory hearsay statements, “defendant did fail to
 8 make payments”, and “the attorneys representing plaintiff (sic) Midland Funding
 9 (sic) LLC were retained on Midland Funding (sic) LLC (sic) behalf”, which should
 10 be stricken. (Ct. Rec. 34-1, p. 16). Midland Funding, LLC has stated it did not
 11 retain Suttell & Hammer, P.S.
 12

13 The Declaration of Elizabeth Neu is created in anticipation of litigation.
 14 Suttell’s records indicate that on August 22, 2008, the Suttell Defendants sent a
 15 request to Midland Credit Management for an “Affidavit from Client”. (Ct. Rec.
 16 62-3, pp. 27-28). On September 2, 2008, the Affidavit of Elizabeth Neu was
 17 received by Defendant Suttell. (Ct. Rec. 62-3, pp. 27-28). Records created in
 18 anticipation of litigation are inherently “untrustworthy” and should not be
 19 admitted. *U.S. v. Olano*, 62 F.3d 1180, 1205 -1206 (9th Cir., 1995). The court
 20 should strike the Declaration from the record.
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 MOTION TO STRIKE - 4

Michael D. Kinkley P.S.
 4407 N. Division, Suite 914.
 Spokane, WA 99207
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1 III. "Bill of Sale and Assignment" (Ct. Rec. 34-1, p.18-19,)

2 The "Bill of Sale and Assignment" states "Spiegel Acceptance Corporation",
 3 not FCNB, is transferring the account to Defendant Midland Funding, LLC. (Ct.
 4 Rec. 34-1, p.18). The Suttell Defendants' entire argument is based on Ms. Gray's
 5 account being formed by FCNB. The Suttell Defendants offer no explanation how
 6 and FCNB account could be assigned by "Spiegel Acceptance." The "Bill of Sale
 7 and Assignment" describes an "account schedule attached hereto as Exhibit A."
 8 (Ct. Rec. 34-1, p. 18). No "account schedule" is attached, nor is it attached in the
 9 State Court.

10 FCNB was ordered to cease and desist servicing all accounts by the Office
 11 of the Comptroller of Currency ("OCC") no later than June 30, 2003. (Ct. Rec. 62-
 12 1, p.5). The Bill of Sale is dated December 4, 2007. (Ct. Rec. 34-1, p. 18). The
 13 Defendant provides no explanation.

14 IV. "Spiegel" Statement (Ct. Rec. 34-1, p. 20)

15 Defendants brief states the statement was from FCNB. (Ct. Rec. 34, p. p.8,
 16 ln. 6). In his deposition, Defendant Mark Case stated he believed the statement was
 17 received from Spiegel. (Case Depo., Ct. Rec. 42-1, pp 44). Defendant Midland
 18 Funding, LLC has produced purported September 2, 2004 statement. (Ct. Rec. 62-
 19 2, p. 21). The September 2, 2004, statement is inconsistent with the one offered by
 20 the Suttell Defendants. For instance, the Midland Statements requests payment to a
 21

different address (“Card Processing Center”) and states another inconsistent balance (“\$1,604.77”) (Ct. Rec. 62-2, p. 21).

V. “FCNB Agreement” (Ct. Rec. 34-1, p. 21)

A document titled “FCNB Card Account Agreement” is also included in “Exhibit ‘A’”. The Defendants cite to the purported agreement to support the conclusory statement, “It is undisputed here that the written agreement with Ms. Gray was with FCNB.” (Ct. Rec. 34-1, p. 8, ln. 5). This is not true. Plaintiff Gray’s name does not appear anywhere on the purported agreement. (Ct. Rec. 34-1, p. 21). The effective date of the agreement is not listed. (Ct. Rec. 34-1, p. 21). The agreement does not mention a Spiegel credit card. (Ct. Rec. 34-1, p. 21). The agreement is unsigned. (Ct. Rec. 34-1, p. 21). Nothing in the purported agreement suggests it applies to the Plaintiff or the subject Spiegel account. There is no affidavit stating it was mailed or otherwise provided to Ms. Gray.

VI. Conclusion

For the reasons stated above, “Exhibit ‘A’” attached to the Defendants Memorandum in Support of Summary Judgment Re: Statute of Limitations, should be stricken from the record and not considered by the Court.

1 DATED this the 2nd day of August 2010.
2
3

4 *Michael D. Kinkley P.S.*
5

6 s/Scott M. Kinkley
7

8 Scott M. Kinkley
9 WSBA # 42434
10 Attorney for Plaintiff
11 4407 N. Division, Suite 914
12 Spokane, WA 99207
13 (509) 484-5611
14 Fax: (509) 484-5972
15 skinklev@qwestoffice.net
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Michael D. Kinkley P.S.
4407 N. Division, Suite 914.
Spokane, WA 99207
(509) 484-5611

1 CM/ECF CERTIFICATE OF SERVICE
2

3 I hereby certify that on the 2nd day of August, 2010, I electronically filed the
4 foregoing with the Clerk of the Court using the CM/ECF System which will send
5 notification of such filing to the following:
6

7 Michael D. Kinkley mkinkley@qwestoffice.net, pleadings@qwestoffice.net;
8 Scott M. Kinkley skinkley@qwestoffice.net;
9 Kirk D. Miller kmiller@millerlawspokane.com
10 Carl Hueber ceh@winstoncashatt.com;
11 John D. Munding munding@crumb-munding.com

12 *Michael D. Kinkley P.S.*

13
14 s/Scott M. Kinkley
15 Scott M. Kinkley
16 WSBA # 42434
17 Attorney for Plaintiffs
18 4407 N. Division, Suite 914
19 Spokane, WA 99207
20 (509) 484-5611
21 skinkley@qwestoffice.net
22
23
24
25

MEMORANDUM IN SUPPORT OF
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Michael D. Kinkley P.S.
4407 N. Division, Suite 914.
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